

I INTRODUCTION

This is a complex medical malpractice action brought by the plaintiffs, Regina Ankrah and Isaac Owusu-Afriyie, as co-executors of the estate of their late daughter, Angelina Owusu-Afriyie. This action has been brought to recover for the wrongful death of Angelina Owusu-Afriyie due to the alleged negligent medical care and treatment rendered to her and her mother by the defendants, the United States of America through its agent, Lise Tardif, M.D., as well as Kenneth Gerweck, M.D. and Sandra L. Salerno, R.N.

The defendant, Kenneth K. Gerweck, M.D. has moved for summary judgment asserting that he is immune from liability for any and all negligent acts committed during the period of alleged negligence under M.G.L. c. 258 § 2. Plaintiffs oppose summary judgment and thereby assert that there is a genuine issue of material with respect to whether the defendant, Kenneth K. Gerweck, M.D. was under the “direction and control” of the Commonwealth of Massachusetts when he provided care to Regina Ankrah and Angelina Owusu-Afriyie.

II STATEMENT OF MATERIAL FACTS OF RECORD

1. Late in the evening on August 11, 2002, the plaintiff, Regina Ankrah, was in labor and admitted to the University of Massachusetts Memorial Medical Center and became the patient of an attending family medicine physician, defendant Lise Tardif, M.D., a family medicine resident physician, defendant

Kenneth Gerweck, M.D., and a registered nurse, defendant Sandra Salerno, R.N. (See “Exhibit 1” Deposition of Defendant Kenneth K. Gerweck, M.D., at page 26, 28, 53).

2. Prior to his treatment of Ms. Ankrah, Dr. Gerweck had been involved with approximately 50 to 150 labor and deliveries. (See Exhibit 1 page 60).

3. Dr. Gerweck admitted Ms. Ankrah to the hospital on his own. (See Exhibit 1 page 27).

4. Upon admitting Ms. Ankrah, Dr. Gerweck personally obtained her history and performed his own physical examination, which he dictated into the medical record. (See Exhibit 1 page 29).

5. Dr. Tardif was not present at the time. (See Exhibits 1; 2 *generally*).

6. Dr. Gerweck elected, on his own, not to perform a pelvic examination when he initially saw Ms. Ankrah. (See Exhibit 1 page 33).

7. Shortly after Ms. Ankrah’s admission, an obstetrical consultation was obtained. (See Exhibit 1 page 41).

8. There is a question of material fact as to whether Dr. Gerweck obtained this consultation on his own or if he did so in conjunction with Dr. Tardif. (See Exhibit 1 page 42).

9. The purpose of the consult was to determine how to manage Ms. Ankrah’s care. (See Exhibit 1 page 43).

10. The next time Dr. Gerweck visited Ms. Ankrah was around 1:00 a.m. on August 12, 2002. (See Exhibit 1 page 45).

11. Dr. Tardif was not present at the time. (See Exhibit 1 generally; “Exhibit 2” Deposition of Defendant Lise Tardif, M.D., at page 68).

12. Dr. Gerweck admits that he is unsure as to why he saw Ms. Ankrah at that time. (See Exhibit 1 page 45).

13. There is a question of material fact as to whether Dr. Gerweck was instructed to check on Ms. Ankrah or if he, himself, made the decision to check on her. (See Exhibit 1 page 45).

14. Upon visiting Ms. Ankrah around 1:00 a.m., Dr. Gerweck determined she was uncomfortable, he performed a pelvic exam, examined the tocometer, strip and fetal heart tracing, and noted his findings. (See Exhibit 1 page 47).

15. Dr. Tardif was not present at the time. (See Exhibits 1; 2 *generally*).

16. There is nothing in the medical record to suggest that Dr. Gerweck relayed his findings from the 1:00 a.m. examination to Dr. Tardif. (See Exhibit 1 page 51-2).

17. Dr. Tardif has testified that she was very busy during the period of alleged negligence and that she was with Dr. Gerweck only during the beginning of the night. (See Exhibit 2 page 68).

18. Around 4:15 a.m., nurse Salerno sought Dr. Gerweck while he was sleeping in the on-call room and expressed to him that she was concerned about Ms. Ankrah’s condition. There is no indication in the medical record that Dr. Gerweck consulted with Dr. Tardif at the time about Ms. Ankrah’s care. (See Exhibit 1 pages 46, 54).

19. Massachusetts case law is unsettled as to whether the University of Massachusetts Medical School is a public employer. *Mensah v. Goedken*, 2006 WL 1075453 at *7 (Mass. Super. April 4, 2006).

III STANDARD OF REVIEW

Summary judgment shall be granted where there are no genuine issues of material fact in dispute and the moving party is thus entitled to judgment as a matter of law. *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating these elements. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "An issue is 'genuine' for purposes of summary judgment if the evidence is such that a reasonable jury *could* return a verdict for the nonmoving party, and a 'material fact' is one which might affect the outcome of the suit under the governing law." *Carcieri v. Norton*, 398 F.3d 22, 29 (1st Cir. 2005) (*emphasis added*).

The Court must view the record, and all reasonable inferences drawn therefrom, in the light most favorable to the non-moving party. *Chapman v. Bernard's Inc.*, 167 F.Supp.2d 406, 411 (D.Mass. 2001) (*citing O'Connor v. Steeves*, 994 F.2d 905, 907 (1st Cir. 1993)). "[T]o defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial-worthy issue by presenting 'enough competent evidence to enable a finding favorable to the nonmoving party.' " *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 842 (1st Cir.

1993) (quoting *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir. 1993)). Summary judgment is inappropriate where a trial judge finds that a reasonable-minded jury *could* find in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (*emphasis added*).

IV CHOICE OF LAW

This case was initially filed in Massachusetts Superior Court, but was subsequently removed to this Honorable Court due to the applicability of the Federal Tort Claims Act with respect to the liability of (then) defendant, Lise Tardif, M.D. Since removal to Federal Court, all claims of liability against Dr. Tardif are being adjudicated against the United States of America, under federal question jurisdiction pursuant to 28 U.S.C. § 1331. All claims against Kenneth Gerweck, M.D. shall be heard by this Federal Court under supplemental jurisdiction pursuant to 28 U.S.C. § 1367. State-law claims in the Federal District Court, brought purely under supplemental jurisdiction, must be adjudicated according to the substantive law of the forum state within which the District Court sits. *Dykes v. Deputy, Inc.*, 140 F.3d 31, 39 (1st Cir. 1998); *See generally Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Because Dr. Gerweck's liability is purely an issue of Massachusetts state law, this court is to apply controlling state law in adjudicating all claims against Dr. Gerweck. Specifically, by claiming to be a "public employee" for the purposes of immunity under M.G.L. c. 258 § 2,

this Honorable Court is bound by the Massachusetts state courts' treatment of this particular issue.

V ARGUMENT

A. Summary Judgment Should be Denied because a Genuine Issue of Material Fact Exists as to whether the University of Massachusetts Medical School is a Public Employer

The Massachusetts Tort Claims Act establishes that a “public employee” shall not be held personally liable for his negligent acts committed during the course of his employment. M.G.L. c. 258 § 2. A public employer is “the Commonwealth and any county, city, town, educational collaborative, or district...and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof *which exercises direction and control over the public employee.*” M.G.L. c. 258 § 1; M.G.L. c. 258 § 2; *McNamara v. Honeyman*, 406 Mass. 43 (1989) (*emphasis added*).

Case law prior to 1998 had consistently held that the University of Massachusetts Medical School is a “public employee” due to its close affiliation with and dependence on the Commonwealth in many regards, including state regulation of appropriations, purchasing power, employment practices, etc. *McNamara* 406 Mass. at 48. However, since the 1998 merger of the “public”, UMass Clinical System and the “private”, Memorial Health Care, Inc., Massachusetts courts have held that a genuine issue of material fact exists as to whether the UMass Medical School, in fact, remains a “public employer” pursuant

to M.G.L. c. 258 § 2. *Mensah v. Goedken*, 2006 WL 1075453 at *7 (Mass. Super. April 4, 2006) (applying *McNamara* 406 Mass. 43).

Prior to 1998, the University of Massachusetts operated the UMass Medical School and the UMass Medical Center (“UMMC”), together with a number of other medical facilities, known as the “UMass Clinical System.” *Id.* at *1. In 1998, the UMass Clinical System merged with Memorial Health Care, Inc., a *private*, non-profit corporation, which created two *private* corporations, UMass Memorial Health Care, Inc. (“UMass Memorial”), and UMass Memorial Medical Center, Inc. (“The Medical Center”). *Id.*

Prior to the merger, the University of Massachusetts, UMass Memorial, and the Medical Center executed an Academic Affiliation and Support Agreement (“Affiliation Agreement”), which made Medical School the sole teaching affiliate of the Medical Center. *Id.* The Affiliation Agreement made certain that residents would have continued access to clinical sites and research opportunities following the merger. *Id.* The Affiliation Agreement also established that the University was to control all medical education and training, and supervision, direction, and control of its residents. *Id.* As part of each resident’s specific rotation assignment, a Graduate Medical Executive Agreement (“GME”) was executed specifying that all residents were intended to remain employees of the University, not the Medical Center. *Id.* at *2.

Dr. Gerweck contends that as a resident under the Affiliation and GME Agreements, he remained a public employee during his course of treatment of the

plaintiff. However, Massachusetts state courts have held that such a determination is by no means clear-cut. *Id.* at *7. Specifically, the 1998 merger of the various public and private entities created two *private*, non-profit corporations, evidenced even on the face of the merger agreement. *Id.* (*emphasis added*). Despite the content of the post-merger agreements, this does not automatically entitle the physicians to a finding of “public employee”; rather, Courts must examine the *specific manner* in which each defendant physician actually treated the plaintiff. *Id.*

In Dr. Gerweck’s Motion for Summary Judgment, the defendant focuses exclusively upon the pre-merger status of the University of Massachusetts Medical School and completely ignores the recent development in Massachusetts case law with respect to this issue. Given the post-merger status of the Medical School and recent Massachusetts case law addressing this precise issue, the plaintiffs assert that a genuine issue of material fact exists with respect to whether UMass Medical School is, in fact, a public employer.

B. Summary Judgment Should be Denied because Dr. Gerweck Treated the Plaintiff Independent of the Direction and Control of the Medical School

The Massachusetts Tort Claims Act provides that “public employees” shall be immune from liability for any and all negligent acts committed during the course of their employment. M.G.L. c. 258 § 2. Likewise, “public employers” shall be held ultimately liable for the negligent acts of their “public employees”, if

committed within the scope of employment. *Pruner v. Clerk of Superior Court in the County of Norfolk*, 382 Mass. 309, 313, (1981); M.G.L. c. 258 § 2. Specifically, the “public employer” must exercise direction and control over the employee in order to be considered a “public employee.” M.G.L. c. 258 § 2; *McNamara v. Honeyman*, 406 Mass. 43 (1989).

Although an individual may be employed by a “public employer”, he does not automatically enjoy the status of “public employee.” *Smith v. Steinberg*, 395 Mass. 666, 668 (1985). In order to determine whether an individual is a “public employee”, courts are required to examine “whether an agent is a servant for whose negligent acts a principal may be liable under the common law doctrine of respondeat superior.” *Kelley v. Rossi*, 395 Mass. 659, 661 (1985). As a general rule, it is well established that physicians are not servants subject to the direction and control of their employer-facilities. *Smith*, 395 Mass. 666 at 667. The determination of whether a physician is a “public employee” is based upon the extent to which the “public employer” directs the specific care and treatment of each individual patient. *Id.*

The Courts must consider several factors in determining whether a resident-physician is a “public employee”, such as whether the “public employer”:

- 1) assigns the resident’s duties; 2) regulates the resident’s schedule; 3) controls which patients the resident treats; 4) assigns the resident to a particular department; 5) has authority to dismiss the resident from the program; 6) requires the resident to follow its policies and regulations; 7) controls the resident’s

admitting privileges; 8) authorizes the resident to discharge patients; and 9) pays the salary and benefits of the resident. *Kelley*, 395 Mass. at 664. Courts must also, however, closely examine 1) the resident's individual discretion in treating a patient; 2) the extent to which the resident sought the assistance of the attending physician; and 3) how closely and consistently the resident worked with the attending physician. *Mills-Ort v. Germano*, 2006 WL 1360813 at *4 (Mass. Super. April 4, 2006).

Further, where the record is unclear as to the extent of direction and control the attending exercised over the resident, Courts place particular emphasis on testimony. *Id.* Where there is an absence of specific details concerning the supervision of residents, Massachusetts courts have deemed summary judgment to be inappropriate. *Id.* Massachusetts courts have consistently held that summary judgment is improper where the record fails to show, indisputably, that the defendant was subject to the control of the "public employer." *Smith*, 395 Mass. 666 at 669.

Here, in an attempt to qualify as a "public employee", Dr. Gerweck focuses his Motion for Summary Judgment entirely upon his contractual relationship with the University of Massachusetts, as well as his official duties and obligations to the Medical Center, but fails to provide any details of his actual care and treatment of Mr. Ankrah. A careful look at the medical records and sworn testimony reveals that Dr. Gerweck treated Ms. Ankrah in a manner independent of the supervision, direction, and/or control of the attending

physician, Dr. Tardif, and the University of Massachusetts. (See Exhibit 1 *generally*).

Prior to the period of alleged negligence, Dr. Gerweck had been involved in many labor and deliveries. (See Exhibit 1 page 60). Upon Ms. Ankrah's admission to the Medical Center, Dr. Gerweck, acting on his own, obtained her medical history and performed a physical examination. (See Exhibit 1 page 29). Dr. Tardif was not present when this was done. (See Exhibit 1 page 33). Dr. Gerweck elected, on his own, not to perform a pelvic examination at the time. *Id.* The next time Dr. Gerweck visited Ms. Ankrah was around 1:00 a.m. on August 12, 2002. (See Exhibit 1 page 45). Dr. Tardif was also not present for this visit. *Id.*

During his 1:00 a.m. visit with Ms. Ankrah, Dr. Gerweck determined she was uncomfortable, performed a pelvic exam, and examined and noted his findings of the tachometer and fetal heart tracing. (See Exhibit 1 page 47). Dr. Tardif was not present during these interactions. (See Exhibit 1 page 45). Dr. Gerweck recalls speaking with Dr. Tardif on the telephone, yet fails to remember if they ever discussed Ms. Ankrah's labor. (See Exhibit 1 page 46). The substance of this conversation is also absent from the medical records. *Id.* It is important to note that Dr. Tardif admits that both she and Dr. Gerweck were very busy on the night in question and that she was only with Dr. Gerweck during the beginning of the night. (See Exhibit 2 page 68). Therefore, for the vast majority of Ms. Ankrah's labor during the period of time in which the plaintiffs allege that

intervention was required, Dr. Gerweck was managing Ms. Ankrah on his own. Later that evening, around 4:15 a.m., nurse Salerno sought out and notified Dr. Gerweck that she was concerned about Ms. Ankrah's labor. (See Exhibit 1 page 54).

When applying the criteria set forth in *Mills-Ort v. Germano*, 2006 WL 1360813 (Mass. Super. April 4, 2006), it is clear that Dr. Gerweck was not under the "direction and control" of his alleged public employer. The medical records and deposition testimony establish that: Dr. Gerweck exercised his own discretion in caring for and treating Ms. Ankrah; Dr. Gerweck did not consult Dr. Tardif throughout the vast majority of his time spent caring for Ms. Ankrah; and Dr. Gerweck was not working closely or consistently with Dr. Tardif during his care and treatment of Ms. Ankrah.

Clearly, there is an absence of specific details concerning what supervision, if any, Dr. Gerweck was subject to during the period of time he cared for Regina Ankrah and Angelina Owusu-Afriyie. However, from the information that is available, it is clear that Dr. Gerweck was acting independently with regard to the decisions he was making and his overall care and treatment of the plaintiffs. Certainly, when these facts are viewed in a light most favorable to the plaintiffs, a genuine issue of material fact exists as to whether Dr. Gerweck was under the "direction and control" of Dr. Tardif during his care and treatment of Ms. Ankrah.

VI CONCLUSION

While claiming public immunity under M.G.L. c. 258 § 2 in his Motion for Summary Judgment, Dr. Gerweck has relied on out of date case law concerning the status of the University of Massachusetts Medical School as a public employer. Given the complex nature of the merger between multiple public and private health care facilities and teaching institutions, a genuine issue of material fact exists as to whether the Medical School is a public employer. Further, it is clear from the medical records and deposition testimony that, a genuine issue of material fact exists as to whether Dr. Gerweck was subject to the direction and control of a public employer while treating Ms. Ankrah. Rather, Dr. Gerweck was making his own, independent evaluations, assessments, and decisions with regard to his care and treatment of Regina Ankrah. It is those evaluations, assessments, and decisions that he made that are at the heart of the malpractice case filed against him. Therefore, for the reasons mentioned above, summary judgment is inappropriate.

WHEREFORE, the plaintiffs respectfully request this Honorable Court:

- A. Deny Defendant's Motion for Summary Judgment;
- B. In the alternative, grant the plaintiffs a hearing on this Motion; and
- C. Grant such further relief as may be just and proper.

Respectfully submitted,
Regina Ankrah and Isaac Owusu-Afriyie,
By their attorney,

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 04-40249

- - - - - x

REGINA ANKRAH and ISAAC OWUSU-AFRIYIE,
AS CO-EXECUTORS OF THE ESTATE
OF ANGELINA OWUSU-AFRIYIE,

Plaintiffs

V.

THE UNITED STATES OF AMERICA,
KENNETH K. GERWECK, M.D. and
SANDRA L. SALERNO, R.N.,

Defendants

- - - - - x

DEPOSITION of KENNETH K. GERWECK, M.D.,
called on behalf of the Plaintiffs, taken pursuant to
the provisions of the Massachusetts Rules of Civil
Procedure, before Kathleen Pellegrino, a Professional
Court Reporter and Notary Public, in and for the
Commonwealth of Massachusetts, at Crowe & Mulvey, 141
Tremont Street, Boston, MA 02111, on Thursday,
March 2, 2006, commencing at 10:07 a.m.

KATHLEEN PELLEGRINO
COURT REPORTING SERVICES
35 French Avenue
Braintree, MA 02184
(781) 849-3838

1 duties.

2 Q All right. What were your duties and
3 responsibilities on August 11th of 2002 when
4 Regina Ankrah was a patient at Memorial
5 Hospital?

6 A That evening I was on call for Family
7 Medicine for the Family Health Center. So I
8 was involved in various things, including
9 seeing medical patients, spending some time
10 with this obstetric patient, taking calls and
11 doing phone triage.

12
13 (Whereupon, Mr. Farquhar entered
14 the deposition at 10:28 a.m.)

15
16 Q When you said you were on call, what do you
17 mean by on call?

18 A That means that during the after-hours I have
19 -- what do you mean by on call?

20 Q Did you have an on-call schedule? How did
21 you happen to be at the hospital on that --

22 A I was at the hospital because I was on call,
23 and we oftentimes take call from the hospital
24 because we'd see patients in the hospital.

1 Q Did you spend the entire day on August 11th
2 at the hospital?

3 A I don't remember.

4 Q Where else would you had been?

5 A If I had clinic that day, I'd be in the
6 clinic.

7 Q This is the Family Practice Clinic, correct?

8 A That's correct.

9 Q Did you ever see Mrs. Ankrah in the clinic
10 during her prenatal visits?

11 A I don't believe so.

12 Q Have you ever looked at the prenatal records?

13 A Not that I recall.

14 Q Approximately what time was your first
15 contact with Mrs. Ankrah?

16 A It would be shortly after she arrived into
17 the nurses' triage room, --

18 Q Please feel free to look at the records.

19 A -- which would be shortly before I wrote the
20 note, that first note. So probably sometime
21 around 11 p.m. -- 9 p.m. Around 9 p.m.

22 Q So shortly after she was admitted to the
23 hospital?

24 A That's correct.

1 Q To your understanding, was that the first
2 time you ever met Mrs. Ankrah?

3 A Yes.

4 Q What did you consider to be your duties and
5 responsibilities with respect to her labor
6 and delivery?

7 A Well, that's hard to say. Duties and
8 responsibilities? I was under the
9 supervision of the attending physician.

10 Q Who was the attending?

11 A That's Dr. Tardif.

12 Q Was Dr. Tardif an attending Family Practice
13 physician?

14 A Yes.

15 Q Why was Mrs. Ankrah admitted to the Family
16 Practice service as opposed to the
17 obstetrical service?

18 A Because she was a Family Practice patient.

19 Q Do you know how she became a Family Practice
20 patient?

21 A No.

22 Q Was there an obstetrical clinic at Memorial
23 Hospital at that time also?

24 A There was at least an obstetric high-risk

1 clinic. I don't know where their other
2 clinics are.

3 Q So you were being supervised on that evening
4 by Dr. Tardif who was Mrs. Ankrah's attending
5 physician, correct?

6 A For that evening, yes.

7 Q Where was Mrs. Ankrah when you first saw her?

8 A I believe she was in the nurses' triage room.

9 Q What did you do when you first saw her?

10 A I don't remember the specifics of what I did.

11 Q Do you have any independent memory apart from
12 what's in the medical record of this first
13 visit you had with Mrs. Ankrah?

14 A No.

15 Q Based upon your review of the medical
16 records, what did you do when you first saw
17 her?

18 A Well, again, I don't know what I first did,
19 but at some point I did a history and did an
20 exam.

21 Q What was the history that you took at that
22 first visit?

23 A Would you like me to read it?

24 Q Are you referring to the Admission History

1 have in front of us about her prenatal course
2 that is concerning, correct?

3 MS. BEATTIE: Objection.

4 Go ahead.

5 A Well, let's see. There's a portion of the
6 prenatal labs here that look okay, and
7 there's nothing here stating that she told me
8 that there were concerns during the prenatal
9 course.

10 Q Did you then do a physical examination?

11 A Yes.

12 Q What did you do in the course of your
13 physical examination?

14 A Well, I don't recall, but looking at the
15 notes, it looks like first I looked at her
16 and felt that she appeared comfortable. I
17 looked at her temperature. I did a pelvic
18 exam -- or actually, it wasn't me. It was
19 the nurse who did the exam, the pelvic exam
20 portion of it. It appears I did an abdominal
21 exam and listened to her heart.

22 Q There's an indication in your record that she
23 had a temperature of 101.1, correct?

24 A That's correct, right.

1 respect to this particular practice, right?

2 A Yes.

3 Q One of the way you'd do that is by providing
4 information to the attending, correct?

5 A In what situation?

6 Q In this situation.

7 A In this particular situation I provided
8 knowledge to the attending.

9 Q And that was Dr. Tardif, right?

10 A That's correct.

11 Q One of the things you would have told her was
12 that the fetal heart tracing was not
13 reassuring, correct?

14 A Most likely I would have described what I
15 saw. Whether I used that term or not, I
16 can't tell you.

17 Q What was the plan of treatment that was
18 determined for this labor and delivery based
19 upon your review of the medical records?

20 A The obstetrician was consulted. So at that
21 point in time the plan was to consult OB, to
22 order a CBC type and screen, --

23 Q I'm sorry, a what?

24 A A complete blood count, and to start

1 penicillin for a possible chorioamnionitis.

2 Q What is chorioamnionitis?

3 A I don't know specifically anymore what that
4 is. I think literally it would be
5 inflammation of the chorion.

6 Q Were you the one that asked for an OB
7 consult?

8 A I don't know if it was me or it was
9 Dr. Tardif.

10 Q Or it could have been the two of you in
11 conjunction?

12 A Well, I suppose.

13 Q As a result of the consult with the
14 obstetrician, what was done, if anything,
15 with respect to Mrs. Ankrah?

16 A So OB was consulted. They reviewed the case,
17 and they recommended "treating as for
18 chorioamnionitis" -- that's a quote -- with
19 ampicillin and gentamicin. They recommended
20 Tylenol and consideration of an amnioinfusion
21 if decelerations proved to be variable. So
22 that was their recommendation.

23 Q Was that recommendation followed according to
24 the medical records?

1 A Yes. Well, I'm not sure about the Tylenol,
2 but I believe the amp. and gent. were given.

3 Q What was the purpose for obtaining an
4 obstetrical consult as you understand it?

5 A I would imagine that it was obtained to
6 provide further opinions as to how this case
7 should be managed.

8 Q Because the obstetricians were the experts in
9 this field, correct?

10 A Well, we felt that they could offer some
11 advice that would be helpful.

12 Q Were you told by the obstetrical service to
13 re-consult with them if any problems came up?

14 A I believe so.

15 Q What was your next contact with Mrs. Ankrah?

16 A My next contact as far as the notes suggest
17 was around 1 a.m.

18 Q Did you actually type a note into the record
19 at that time?

20 A Yes, I did.

21 Q So was this the first time you had seen her
22 after the admitting physical?

23 A I don't recall. All I can do is go by the
24 notes. That's the first time I had written a

1 Q So at least according to the record, you next
2 saw Mrs. Ankrah at approximately 1 a.m.
3 We're now on August 12th, correct?

4 A That's correct.

5 Q For what reason did you see her at that time?

6 A I'm not sure exactly why I saw her at that
7 time, whether I was asked to see her or felt
8 that it was an appropriate time to see her or
9 if I had a free moment. I can't tell you
10 what the specific reason was.

11 Q Who was the attending physician responsible
12 for her labor and delivery from admission at
13 approximately 9:19 to 1:00 when you saw her?

14 A The Family Medicine attending physician is
15 Lise Tardif.

16 Q Do you have any memory of any conversations
17 that you had with Dr. Tardif or anybody else
18 with respect to this labor and delivery
19 between your admitting note and 1:00 in the
20 morning?

21 A I only had one recollection, and it's just
22 very vague. I remember while I was in the ER
23 I was on the phone with her.

24 Q With --

1 A Dr. Tardif.

2 Q Okay, and what do you remember about the
3 conversation?

4 A Nothing.

5 Q Do you know whether it had anything to do
6 with Mrs. Ankrah?

7 A I don't remember anything about the
8 conversation. Typically it would be about
9 the patients that I'm seeing either in the ER
10 or perhaps about the patient in the -- the OB
11 patient here, or both, but again, I don't
12 recall.

13 Q You don't know what time the conversation
14 took place?

15 A No.

16 Q And you don't remember what the subject of
17 the conversation was?

18 A That's correct.

19 Q Why is it that you remember that there was a
20 conversation?

21 A I don't know.

22 Q When you came to see Mrs. Ankrah at 1:00,
23 what did you do?

24 A I looked at her, and it appears that I

1 thought she was uncomfortable. I reviewed
2 the vital signs. Again, I'm getting this
3 information from the chart note here.

4 Q Right. Just so that we're clear on the
5 record, you have no independent memory of
6 seeing her at 1:00, correct?

7 A No.

8 Q What you're telling us is based upon what's
9 in the record?

10 A That's correct.

11 Q You have no other knowledge or information
12 about seeing her at that time other than
13 what's in the record, right?

14 A That's right.

15 Q I interrupted you. So tell me what you were
16 doing.

17 A That's right, and it appears that I did a
18 pelvic exam. I notated that, and I looked at
19 the strip, the tocometer, as well as the
20 fetal heart tracing and commented on that.

21 Q Why would you have looked at the strip?
22 Would that have been part of your practice
23 and procedure at that time?

24 A That would be the custom.

1 A Yes.

2 Q Do you know what you meant by that?

3 A No.

4 Q Do you know what Nubain is?

5 A It's a medicine that's commonly used in
6 Obstetrics. I've never seen it used
7 elsewhere, actually. I don't know what class
8 it's in.

9 Q What's it given for, if you remember?

10 A Pain.

11 Q How was it given, if you recall?

12 A I don't remember.

13 Q Then your last line on that note is, "Discuss
14 with Dr. Tardif," correct?

15 A That's correct.

16 Q That's something that as a third-year
17 resident you would have done given these
18 findings, right?

19 A Yes.

20 Q And then your name appears, right?

21 A That's right.

22 Q When did you next see or hear anything about
23 Mrs. Ankrah?

24 A I don't recall when I next heard or saw her.

1 I may have never seen her again.

2 Q Do you have any other entries in the record
3 other than the ones that we've just looked
4 at?

5 A Not that I know of.

6 Q Well, were you present when the decision was
7 made to do a cesarean section?

8 A I don't know.

9 Q Did you ever hear about what happened with
10 respect to this delivery?

11 A Yes.

12 Q What did you hear?

13 A That the baby died.

14 Q How did you hear that?

15 A I don't know who told me, but I believe I was
16 in the clinic at the time when I heard about
17 it.

18 Q Did you hear about it the same day that it
19 happened?

20 A I'm not sure.

21 Q You were not present for the cesarean
22 section, correct?

23 A That's correct.

24 Q After you heard that the baby died, what did

1 you do, if anything?

2 A I don't remember.

3 Q Did you have any conversations with anybody?

4 A I don't remember.

5 Q Were you surprised?

6 A I really don't remember.

7 Q Did you discuss this labor and delivery and
8 the results with any other physician
9 afterwards?

10 A I don't remember. I don't believe I
11 discussed it a lot with anybody.

12 Q Well, that's not what I asked you. Did you
13 have any discussions at all with anybody?

14 A Well, if I did, I don't remember them.

15 Q Who was the Labor nurse for Mrs. Ankrah
16 during this labor?

17 A I believe it was Salerno. Is that her last
18 name?

19 Q Do you remember any contact that you had with
20 Ms. Salerno during the course of this labor?

21 A The only memory I have is I believe she was
22 present when I first saw the patient.

23 Q In your Answers to Interrogatories you
24 indicated, and you say, (Reading):

1 "The medical record
2 indicates --

3
4 Strike that. Let me start over again.
5 (Reading):

6
7 "I also recall at some point
8 taking a nap in the on-call
9 room and being awakened by
10 Ms. Salerno because she had
11 concerns regarding Mrs.
12 Ankrah. The medical record
13 indicates this was at
14 approximately 4:15 a.m."

15
16 Where did you get that information?

17 A The Interrogatories were taken about a year
18 and a half ago, so at the time it may have
19 been from my memory.

20 Q Would it have been your custom and practice
21 when you saw Mrs. Ankrah at 1:00 to review
22 the nurses' notes?

23 A I don't remember.

24 Q You can't remember whether that was something

1 responsibility, don't they?

2 MS. BEATTIE: Objection.

3 Go ahead.

4 A No, I -- no.

5 Q Whose job was it to formulate the treatment
6 plan for this labor and delivery?

7 A Primarily, Dr. Tardif's.

8 Q To your knowledge, have you ever spoken with
9 Mrs. Ankrah or the baby's father after this
10 death?

11 A I have no memory of speaking to them
12 afterwards.

13 Q How many labor and deliveries had you been
14 involved in prior to this, approximately?

15 A I have a very poor memory of that. The
16 approximation would be probably not accurate
17 in any way, but perhaps somewhere between 50
18 and 150.

19 Q Before this death, correct?

20 A Yes.

21 Q How did you learn how to read fetal heart
22 monitor strips?

23 A I don't recall the specifics. Some of it
24 would involve on-the-job training. Some of

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COMMONWEALTH OF MASSACHUSETTS

U.S. DISTRICT COURT
CIVIL ACTION
NO. 04-40249

- - - - - x

REGINA ANKRAH AND ISAAC OWUSU-AFRIYIE,
AS CO-EXECUTORS OF THE ESTATE OF
ANGELINA OWUSU-AFRIYIE,

Plaintiffs

V.

THE UNITED STATES OF AMERICA,
KENNETH K. GERWECK, M.D. and
SANDRA L. SALERNO, R.N.

Defendants

- - - - - x

DEPOSITION of LISE J. TARDIF, M.D., called on
behalf of the Plaintiffs, taken pursuant to the
provisions of the Massachusetts Rules of Civil
Procedure, before Kathleen Pellegrino, a Professional
Court Reporter and Notary Public, in and for the
Commonwealth of Massachusetts, at Crowe & Mulvey, 141
Tremont Street, Boston, MA 02111, on Monday,
May 8, 2006, commencing at 1:05 p.m.

KATHLEEN PELLEGRINO
COURT REPORTING SERVICES
35 French Avenue
Braintree, MA 02184
(781) 849-3838

1 of the actual conversations?

2 A Not word for word, just a vague content
3 usually pertaining to management.

4 Q Do you have a memory that Dr. Gerweck spent a
5 great deal of time that night in the
6 Emergency Room with other patients?

7 A I do recall a very busy night. I do recall
8 him being very busy and calling me several
9 times for other things. I do recall that.

10 Q In looking back, pursuant to your memory, do
11 you have a memory of who was with Ms. Ankrah
12 more, who was examining Ms. Ankrah more,
13 whether it was you or Dr. Gerweck?

14 A We were both there at the beginning, but
15 going towards further in the night,
16 Dr. Gerweck was busy, and I was also busy,
17 but it was not as much with Ms. Ankrah as I
18 came across.

19 Q So you were with Ms. Ankrah more as the night
20 progressed, is that correct?

21 A Correct.

22 Q Do you have a memory of when it was you
23 actually last saw Ms. Ankrah before 4:00?

24 A I don't. I did not -- I know that I visited